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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/806,252	03/22/2004	Mark R. Kirkland	1795.KIRK.PT	1923
26986 7590 06/01/2007 MORRISS OBRYANT COMPAGNI, P.C. 734 EAST 200 SOUTH SALT LAKE CITY, UT 84102			EXAMINER THAKUR, VIREN A	
			ART UNIT 1761	PAPER NUMBER
			MAIL DATE 06/01/2007	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/806,252	KIRKLAND, MARK R.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Viren Thakur	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.138(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 19 March 2007.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-6, 10-13, 16, 17 and 23-26 is/are pending in the application.
- 4a) Of the above claim(s) 18-22 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-6, 10-13, 16, 17 and 23-26 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 14 June 2004 and 19 March 2007 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)            | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date: _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>1/12/07</u>   | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Response to Amendment***

1. The objection to the drawings has been withdrawn.
2. The rejection of claims 1-9, 14 and 16 under 35 U.S.C. 112, second paragraph has been withdrawn.

### ***Claim Rejections - 35 USC § 112***

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:  
  
The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.
4. Claims 23-26 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Instant claim 23 recites the limitation "non-utilitarian" and "utilitarian."

Even in light of the meaning as stated on Paragraph 0046 of Applicant's specification, the examples provided, such as weights and prize notification devices, have utility. In this case, the weights aid in vending of the container and the prize notification device notifies a consumer of the prize. Both of these

examples are considered to still have utility to a person. Therefore this limitation is still deemed indefinite.

***Claim Rejections - 35 USC § 102***

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

6. **Claims 1-4, 6, 9-11, 13-14 and 16-17 are rejected under 35 U.S.C. 102(b) as being anticipated by Nedblake, Jr. (US 5664671).**

The reference and rejection are taken as cited in the prior Office Action, mailed November 15, 2006.

7. **Claims 1-8 are rejected under 35 U.S.C. 102(b) as being anticipated by Feldmeier et al. (US 6048558).**

The reference and rejection are taken as cited in the prior Office Action, mailed November 15, 2006.

8. **Claims 10-13 are rejected under 35 U.S.C. 102(b) as being anticipated by Bezek et al. (US 6472007).**

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The reference and rejection are taken as cited in the prior Office Action, mailed November 15, 2006.

9. **Claim 23, 24 and 25 rejected under 35 U.S.C. 102(b) as being anticipated by Sayre (US 2433926).**

The reference and rejection are taken as cited in the prior Office Action, mailed November 15, 2006.

10. **Claim 23-25 are rejected under 35 U.S.C. 102(b) as being anticipated by Howes et al. (US 5056659).**

The reference and rejection are taken as cited in the prior Office Action, mailed November 15, 2006.

***Claim Rejections - 35 USC § 103***

11. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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12. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:
1. Determining the scope and contents of the prior art.
  2. Ascertaining the differences between the prior art and the claims at issue.
  3. Resolving the level of ordinary skill in the pertinent art.
  4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
13. **Claim 5 and 7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nedblake Jr. (5664671) in view of Sanford (US 1830246).**

The references and rejection are taken as cited in the prior Office Action, mailed November 11, 2006.

14. **Claim 26 is rejected under 35 U.S.C. 103(a) as being unpatentable over Howes et al. (US 5056659).**

The references and rejection are taken as cited in the prior Office Action, mailed November 11, 2006.

### ***Response to Arguments***

15. Applicant's arguments on page 12, that Nedblake is silent as to any device or mechanism for opening the non-beverage food-containing portion of the container, has been fully considered but is not deemed persuasive. The Examiner asserts that Nedblake Jr. discloses a mechanism for opening the non

food-containing portion of the container, since this is the only way for one to access the sandwich located within the container. The cover (34) of the lower container (14) engages the lower section (32), thus Nedblake Jr. inherently disclose a mechanism for accessing the interior of said non-beverage food product enclosing portion since removing the cover is how to sandwich contained therein is accessed.

16. Applicant's arguments on page 13, that claim 1 requires a container sized and shaped for vending from the containerized beverage pathways of a vending machine structures for vending containerized beverages and that Feldmeier fails to teach a container that is sized and shaped for dispensing from the containerized beverages pathways has been fully considered but is not deemed persuasive. The claims are drawn to a vendable food product, thus the food product need only be capable of being vended. Furthermore, the claims recite wherein "a container sized and shaped *for* being dispensable from the containerized beverage pathways of a vending machine structured to vend containerized beverages." Again the container must only be capable of being vended and therefore, the Examiner respectfully asserts that the container of Feldmeier is capable of being vended. Even further still, the claims are drawn to a product and thus positively recite a container with a food product contained therein and further which must only be capable of being vended. The Examiner asserts that the claims are not drawn to vending but rather to the product, which

is capable of being vended. As stated in the prior Office Action, Sandwich Vending Machines was cited as evidence of vending machines that dispense both beverages and non-beverage comestibles so that both products are dispensed through the same pathway. Therefore claims 1-8 remain anticipated by Feldmeier et al.

17. Applicant's arguments on page 13 that Bezek et al. do not teach or suggest a sandwich-like product has been fully considered but is not deemed persuasive. On Paragraphs 0020 and 0021 of Applicant's specification defines sandwich-like as

"...meant to *imply* and include any type of combined food product that *generally* comprises a bread or bread like element and, preferably, any type of filler material, such as meat, cheese, fish, vegetables, peanut butter and jelly, or combinations thereof. **The use of sandwich or sandwich-like product is not meant to be limited to the conventionally-known type of sandwich comprising two slices of bread with filler material therebetween, but is meant to include products made, for example, of tortillas (e.g. tortilla wraps), pita bread, buns, bagels or any other conceivable bread-like materials or substitutes therefor which generally are suitable for enclosing a filler material.**"

Bezек discloses wherein the food product can be crackers (Column 7, Lines 16-18). The Examiner asserts that based on the definition of sandwich-like which does not exclude bread like materials or substitutes therefor which generally are suitable for enclosing a filler material (such as the dip or cheese of Bezek) (see Column 8, Lines 32-36) that Bezek meets Applicant's definition of sandwich-like.



18. Applicant's arguments on page 13 that amended claim 23 requires a container sized and shaped for dispensing through the containerized beverage pathways of the vending machine is not taught by Sayre has been fully considered but is not deemed persuasive. The Examiner asserts that the container only needs to be capable of being vended and must only be capable of being dispensable from the beverage pathways. As discussed above, vending is an intended use and the claims are only drawn to a container comprising two disparate products that is capable of being vended. The Examiner further respectfully asserts that the container of Sayre is capable of being vended, since Sayre disclose that the product is a vending container. Furthermore, Applicant's arguments that Sayre only teaches one product while the claims require two disparate products is not persuasive. Sayre discloses a first product such as cheese spreads, butter, jellies and jams, relishes, fruit sauces and meat spreads (Column 1, Lines 29-34). Sayre further disclose the utensil, as shown in Figure 4, item 12 as the second disparate product; therefore the Examiner respectfully asserts that Sayre disclose two products within the container. The utensil is placed within the container since it is recessed below the top portion of the walls of the container, as can be seen in Figure 2.
19. Applicant's arguments on pages 13-14 that the amended claim excludes non-utilitarian items such as prize notification devices as taught by Howes et al., has

been fully considered but is not deemed persuasive. The Examiner asserts that Howes et al., disclose a prize, which is not a prize notification device, but rather the prize itself. In light of the rejection under 112, second paragraph regarding utilitarian, the Examiner respectfully asserts that the prize itself is a non-comestible product and thus, Howes et al. meet the instant claim limitations.

20. Applicant's arguments on page 14 that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). Applicant further states that there is no reasonable expectation of success to be found in the references for making the combination because, in fact, the package of Sanford could not be used to enclose a sandwich that is housed within the container disclosed by Nedblake. Applicant further states that Sanford teaches a square envelope-type package that has a follower that is sized in length comparable to the width of the envelope. The follower is used to squeeze the sandwich out of the envelope. It would be impossible, therefore, to fit the necessarily square envelope-type package of Sanford into the round lower compartment of Nedblake.

These arguments have been fully considered but are not deemed persuasive. The Examiner asserts that similar to Nedblake Jr., Sanford teaches a product capable of being vended wherein the container comprises two disparate products. Sanford teaches as an object of the invention, to provide a sanitary package that protects the edible filler from the atmosphere and can be quickly removed the enclosing envelope without being touched by the hands (Lines 5-12). Sanford further teaches that the sandwich like product also comprises a wrapping, as shown in Figure 4, Item 5 to carry out the above stated object of the invention. Thus, Sanford provides the broad teaching of a container comprising two product wherein one of the products is a sandwich-like product that is wrapped. Sanford further teaches that wrapping allows the consumer to eat the sandwich without being touched by the consumer's hands. Furthermore, it would have been well known to the ordinarily skilled artisan that wrapping also aids in ensuring that the contents of the sandwich remain intact during transport and consumption. Regarding the shape of the containers of Nedblake and Sanford, the Examiner asserts that Sanford teaches wrapping a sandwich for the purpose of protecting the sandwich. The shape of the sandwich has been well known to be circular, square or triangular, for example, therefore to wrap any other shape of sandwich would have been obvious to one having ordinary skill in the art. Since Nedblake teaches wherein the container holding the sandwich-like product conforms to the shape of the entire package, it would have been obvious that if a different shape was used for the package that the sandwich could also take the

same of the package. Therefore, the Examiner asserts that there would have been a reasonable expectation of success of using the teachings of Sanford for wrapping the sandwich of Nedblake, Jr. Furthermore, depending on the size of the sandwich, it the package of Nedblake would also have been capable of holding a square sandwich.

21. Applicant's arguments on page 15 that Howes et al. excludes non-utilitarian items such as prize notification devices and that Howes does not teach or suggest a vendable container for containing two utilitarian products has been fully considered but is not persuasive. The Examiner asserts that Howes et al., disclose a prize, which is not a prize notification device, but rather the prize itself. In light of the rejection under 112, second paragraph regarding utilitarian, the Examiner respectfully asserts that the prize itself is a non-comestible product that has utility. Furthermore, the Examiner respectfully asserts that Howes et al. teach wherein the container can comprise bleach, detergents and automotive oils, which are considered non-comestible and further comprises a prize, which is also a non-comestible. Regarding a suggesting to vend a container containing two utilitarian products, the Examiner asserts that the claims only recite wherein the container must be *for* or capable of being vended. Since Howes et al. teach wherein the structures for the bottles can take the shape of commonly dispensed beverage containers, it would have been obvious to one having ordinary skill in

the art that a container comprising two non-comestible products would have been vendable.

***Conclusion***

22. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Viren Thakur whose telephone number is

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(571)-272-6694. The examiner can normally be reached on Monday through Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571)272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Viren Thakur  
Examiner  
Art Unit: 1761



**KEITH HENDRICKS**  
**PRIMARY EXAMINER**